

May 30, 2018

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MARION W.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 1:17-CV-3127-JTR

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 15, 16. Attorney D. James Tree represents Marion W. (Plaintiff); Special Assistant United States Attorney L. Jamala Edwards represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 3. After reviewing the administrative record and briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

JURISDICTION

On October 9, 2013, Plaintiff filed an application for disability insurance benefits, alleging disability since March 12, 2012, due to chronic low back pain, depression, atherosclerotic, memory loss, stomach pains, and headaches. Tr. 166, 192. Plaintiff's application was denied initially and upon reconsideration.

1 Administrative Law Judge (ALJ) Kimberly Boyce held a hearing on
2 September 8, 2015, Tr. 42-78, and issued an unfavorable decision on February 10,
3 2016, Tr. 20-33. The Appeals Council denied review on May 26, 2017. Tr. 1-6.
4 The ALJ's February 2016 decision thus became the final decision of the
5 Commissioner, which is appealable to the district court pursuant to 42 U.S.C. §
6 405(g). Plaintiff filed this action for judicial review on July 28, 2017. ECF No. 1,
7 5.

8 **STATEMENT OF FACTS**

9 The facts of the case are set forth in the administrative hearing transcript, the
10 ALJ's decision, and the briefs of the parties. They are only briefly summarized
11 here.

12 Plaintiff was born on March 1, 1971, and was 41 years old on the alleged
13 onset date, March 12, 2012. Tr. 48,166. She completed high school and two years
14 of college. Tr. 49, 193. Plaintiff's disability report indicates she stopped working
15 on March 12, 2012, because of her condition(s). Tr. 192. She testified she was
16 injured on the job after a fall, Tr. 64, and the main thing preventing her from being
17 able to continue to work was nerve pain resulting from that injury, Tr. 58.

18 Plaintiff stated she suffered low back pressure and debilitating nerve pain up
19 and down her leg. Tr. 58-59, 62. She had looked into, but not attended, physical
20 therapy sessions for the nerve pain. Tr. 60. She explained her next step would be
21 to see a neurologist and she was waiting for an appointment to be made in that
22 regard. Tr. 60, 61. Plaintiff also discussed having depression as a result of the
23 constant pain, Tr. 65, 67, but indicated she had discontinued counseling because it
24 was difficult to focus because of the pain, Tr. 60-61, 67.

25 Plaintiff testified at the September 2015 administrative hearing that she
26 received unemployment benefits after she stopped working in 2012 and was
27 therefore maintaining a job search log and applying for work she was hoping she
28 could perform. Tr. 54-56.

STANDARD OF REVIEW

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational interpretation, the Court may not substitute its judgment for that of the ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the administrative findings, or if conflicting evidence supports a finding of either disability or non-disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision supported by substantial evidence will be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Brawner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

SEQUENTIAL EVALUATION PROCESS

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a), 416.920(a); *Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the burden of proof rests upon the claimant to establish a prima facie case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is met once a claimant establishes that a physical or mental impairment prevents the

1 claimant from engaging in past relevant work. 20 C.F.R. §§ 404.1520(a)(4),
2 416.920(a)(4). If a claimant cannot perform past relevant work, the ALJ proceeds
3 to step five, and the burden shifts to the Commissioner to show that the claimant
4 can perform other jobs present in significant numbers in the national economy.
5 *Batson v. Commissioner of Social Sec. Admin.*, 359 F.3d 1190, 1193-1194 (2004).
6 If a claimant cannot make an adjustment to other work in the national economy, a
7 finding of “disabled” is made. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

8 ADMINISTRATIVE DECISION

9 On February 10, 2016, the ALJ issued a decision finding Plaintiff was not
10 disabled as defined in the Social Security Act.

11 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
12 activity since the alleged onset date, March 12, 2012. Tr. 22. At step two, the ALJ
13 determined Plaintiff had the following severe impairments: spine disorder, morbid
14 obesity, affective disorder and anxiety disorder. Tr. 22. At step three, the ALJ
15 found Plaintiff did not have an impairment or combination of impairments that
16 meets or medically equals the severity of one of the listed impairments. Tr. 23.

17 The ALJ assessed Plaintiff’s Residual Functional Capacity (RFC) and
18 determined she could perform light exertion level work with the following
19 limitations: she could occasionally climb, stoop, kneel, crouch, and crawl; she
20 could perform work in which concentrated exposure to vibration and/or hazards
21 was not present; in order to meet ordinary and reasonable employer expectations
22 regarding attendance, production and work place behavior, she could understand,
23 remember and carry out unskilled, routine and repetitive work that could be
24 learned by demonstration and in which tasks to be performed were predetermined
25 by the employer; and she could perform work that does not require interaction with
26 the general public as an essential element of the job, but occasional incidental
27 contact with the general public was not precluded. Tr. 25.

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1 At step four, the ALJ determined Plaintiff could not perform her past
2 relevant work as a merchandiser, child monitor or order picker. Tr. 32. However,
3 at step five, the ALJ determined that based on the testimony of the vocational
4 expert, and considering Plaintiff's age, education, work experience and RFC,
5 Plaintiff could perform other jobs present in significant numbers in the national
6 economy, including the jobs of housekeeper (light), hand packager (light),
7 production assembler (light), assembler (sedentary) and bench assembler
8 (sedentary). Tr. 32-33. The ALJ thus concluded Plaintiff was not under a
9 disability within the meaning of the Social Security Act at any time from March
10 12, 2012, the alleged onset date, through the date of the ALJ's decision, February
11 10, 2016. Tr. 33.

12 ISSUES

13 The question presented is whether substantial evidence supports the ALJ's
14 decision denying benefits and, if so, whether that decision is based on proper legal
15 standards. Plaintiff contends the ALJ erred in this case by (1) improperly assessing
16 the opinion testimony; and (2) discrediting Plaintiff without specific, clear and
17 convincing reasons to do so. ECF No. 15 at 4.

18 DISCUSSION

19 A. Medical Opinion Testimony

20 Plaintiff asserts the ALJ erred by failing to properly assess multiple medical
21 source opinions of record. ECF No. 15 at 4-16.

22 In a disability proceeding, the courts distinguish among the opinions of three
23 types of acceptable medical sources: treating physicians, physicians who examine
24 but do not treat the claimant (examining physicians) and those who neither
25 examine nor treat the claimant (nonexamining physicians). *Lester v. Chater*, 81
26 F.3d 821, 830 (9th Cir. 1996). A treating physician's opinion carries more weight
27 than an examining physician's opinion, and an examining physician's opinion is
28 given more weight than that of a nonexamining physician. *Benecke v. Barnhart*,

379 F.3d 587, 592 (9th Cir. 2004); *Lester*, 81 F.3d at 830. In weighing the medical opinion evidence of record, the ALJ must make findings setting forth specific, legitimate reasons for doing so that are based on substantial evidence in the record. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). Moreover, the ALJ is required to set forth the reasoning behind its decisions in a way that allows for meaningful review. *Brown-Hunter v. Colvin*, 806 F.3d 487, 492 (9th Cir. 2015) (finding a clear statement of the agency’s reasoning is necessary because the Court can affirm the ALJ’s decision to deny benefits only on the grounds invoked by the ALJ). “Although the ALJ’s analysis need not be extensive, the ALJ must provide some reasoning in order for us to meaningfully determine whether the ALJ’s conclusions were supported by substantial evidence.” *Treichler v. Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1103 (9th Cir. 2014).

The opinion of an acceptable medical source is given more weight than that of an “other source.” 20 C.F.R. §§ 404.1527, 416.927; *Gomez v. Chater*, 74 F.3d 967, 970-71 (9th Cir. 1996). Evidence from “other sources” is any information or statements from a non-medical source about any issue in Plaintiff’s claim. 20 C.F.R. § 404.1513(a)(4). The ALJ is required to consider observations by non-medical sources as to how an impairment affects a claimant’s ability to work. Pursuant to *Dodrill v. Shalala*, 12 F.3d 915 (9th Cir. 1993), an ALJ is obligated to provide germane reasons for discounting “other source” statements.

1. Psychological Limitations

With regard to Plaintiff’s psychological impairments, the ALJ determined Plaintiff had a severe affective disorder and a severe anxiety disorder, Tr. 22, which limited her to understanding, remembering and carrying out unskilled, routine and repetitive work that could be learned by demonstration and in which tasks to be performed were predetermined by the employer. Tr. 25. She was additionally limited to the performance of work that did not require interaction

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1 with the general public as an essential element of the job, but occasional incidental
2 contact with the general public was not precluded. Tr. 25.

3 **a. L. Paul Schneider, Ph.D.**

4 On December 29, 2014, Dr. Schneider completed a Mental Source Statement
5 and checked boxes indicating Plaintiff had several moderate, marked and severe
6 limitations in basic work activities. Tr. 463-464. Dr. Schneider also marked that
7 Plaintiff had “extreme” limitations in activities of daily living and in maintaining
8 concentration, persistence and pace and marked limitations in social functioning.
9 Tr. 465. He further opined that Plaintiff would likely be off task over 30% of the
10 workday and would miss four or more days of work per month. Tr. 465. Dr.
11 Schneider commented that Plaintiff’s life was “extraordinarily dysfunctional.” Tr.
12 466.

13 The ALJ accorded the check-box form report “little weight.” Tr. 30. The
14 ALJ indicated the form mostly contained check off marks without supporting
15 objective information, and the significant limitations were not consistent with
16 Plaintiff’s lack of mental health treatment and her ability to complete daily
17 activities and perform work. Tr. 30.

18 Although the Ninth Circuit recently stated in a footnote that there is no
19 authority that a “check-the-box” form is any less reliable than any other medical
20 form, *Trevizo v. Berryhill*, 871 F.3d 664, 677 n. 4 (9th Cir. 2017), the Ninth Circuit
21 has consistently held that individual medical opinions are preferred over check-box
22 reports, *Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir. 1996); *Murray v. Heckler*,
23 722 F.2d 499, 501 (9th Cir. 1983); *Holohan v. Massanari*, 246 F.3d 1195, 1202
24 (9th Cir. 2001) (holding “the regulations give more weight to opinions that are
25 explained than to those that are not”). An ALJ’s rejection of a check-box report
26 that does not contain an explanation of the bases for the conclusions made is
27 permissible. *Crane*, 76 F.3d at 253; *Young v. Heckler*, 803 F.2d 963, 968 (9th Cir.
28 1986) (an ALJ need not accept a treating physician’s opinion which is “brief and

1 conclusionary in form with little in the way of clinical findings to support [its]
2 conclusion”). Here, Dr. Schneider’s mental source statement provides no
3 explanation in support of the significant limitations assessed on the check-box
4 form.

5 Moreover, the significant limitations assessed on the form are not consistent
6 with the weight of the evidence of record which demonstrated Plaintiff’s mood had
7 improved with medication, Tr. 381, 385, 389, she was not receiving any specific
8 psychiatric treatment by January 2014, Tr. 452, and she had previously
9 discontinued counseling, Tr. 67. Tr. 30. As discussed more fully below, Plaintiff’s
10 receipt of unemployment benefits and continued job seeking activities suggested,
11 and other medical professionals have opined, that Plaintiff was capable of
12 performing work but was unable to find suitable work. Tr. 30.

13 Substantial evidence supports the ALJ’s determination to accord little weight
14 to the significant mental health limitations assessed in Dr. Schneider’s mental
15 source statement.

16 **b. Emma Joan H. Billings, Ph.D.**

17 Dr. Billings performed a psychological examination of Plaintiff on January
18 17, 2014. Tr. 442-447. Plaintiff indicated she was unable to continue to work
19 because of an inability to sit for more than 30 minutes at a time, but also reported
20 she was receiving unemployment benefits at that time. Tr. 443. Plaintiff was not
21 participating in mental health therapy despite complaints of depression symptoms,
22 situational anxiety, and panic attacks. Tr. 444-445. Dr. Billings diagnosed major
23 depressive disorder, recurrent, moderate and anxiety disorder, NOS. Tr. 446. She
24 described Plaintiff as a cooperative individual who was highly emotional
25 throughout the assessment. Tr. 446. Dr. Billings indicated Plaintiff was able to
26 follow directions without any repetition, she did not appear to have any difficulty
27 with attention, she had only a mild loss of concentration on exam, and her pace

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1 was within average rates. Tr. 446. Yet, Dr. Billings noted Plaintiff appeared “to
2 only be functioning at a minimal level.” Tr. 446.

3 The ALJ assigned partial weight to Dr. Billings’ evaluation report. Tr. 30.
4 The ALJ accorded weight to Dr. Billings’ objective mental status examination,
5 which indicated, consistent with the record, that Plaintiff could complete at least
6 three-step commands. Tr. 30. Nevertheless, the ALJ found Dr. Billings’
7 assessment that Plaintiff was functioning only at a minimal level inconsistent with
8 Dr. Billings’ findings that Plaintiff had only mild loss of concentration, she could
9 respond to questions at an average rate, she could follow directions without
10 repetition and she did not have difficulty with attention. Tr. 30.

11 Plaintiff contends the ALJ erred by failing to note “Dr. Billings’
12 observations of several pertinent, positive findings.” ECF No. 15 at 9. Plaintiff
13 indicated Dr. Billings noted Ms. Walker had a concrete level of understanding, was
14 only at the beginning level of abstract understanding, and erred in her serial 7s,
15 ECF No. 15 at 9 (citing Tr. 445-446), and further noted Dr. Billings observed
16 Plaintiff was “highly emotional,” frequently cried during the interview, and spent
17 the exam reclining and changing positions, ECF No. 15 at 9 (citing Tr. 443, 445-
18 446). Plaintiff argues that had the ALJ weighed these observations “heavily,”
19 disability would have been compelled. ECF No. 15 at 9. However, consistent with
20 the ALJ’ ultimate RFC determination, Tr. 25, Dr. Billings’ examination findings
21 reflect that Plaintiff was capable of understanding, remembering and carrying out
22 unskilled, routine and repetitive work. Tr. 446 (Plaintiff had no difficulty
23 completing a three stage command). An ALJ may properly rely upon selected
24 portions of a medical opinion while disregarding other parts. *See Magallanes v.*
25 *Bowen*, 881 F.2d 747, 753 (9th Cir. 1989) (“It is not necessary to agree with
26 everything an expert witness says in order to hold that his testimony contains
27 ‘substantial evidence.’” (quoting *Russell v. Bowen*, 856 F.2d 81, 83 (9th Cir.
28 1988))). In making her RFC determination, the ALJ took into account Dr. Billings’

1 objective findings, which indicated, consistent with the record, that Plaintiff could
2 complete at least three-step commands.

3 With respect to Dr. Billings' comment that Plaintiff "**appears** to only be
4 functioning at a minimal level," Tr. 446, the observation could be construed as an
5 opinion by Dr. Billings that Plaintiff was only able to perform unskilled, routine
6 and repetitive tasks, which is consistent with the RFC determination. If interpreted
7 as an opinion that Plaintiff was limited to a greater extent, it would be inconsistent
8 with Dr. Billings' examination findings that Plaintiff was able to follow directions
9 without any repetition, she did not appear to have any difficulty with attention, she
10 had only a mild loss of concentration on exam, and her pace was within average
11 rates. Tr. 446.

12 The Court finds that the ALJ provided specific and legitimate reasons,
13 supported by substantial record evidence, for discounting Dr. Billings' notation
14 that Plaintiff appeared to be functioning at a minimal level. The ALJ did not err by
15 otherwise crediting Dr. Billings' opinion, supported by objective findings, that
16 Plaintiff could complete at least three-step tasks.

17 **c. Fredrick Montgomery, M.D.**

18 Dr. Montgomery performed a psychiatric evaluation pertaining to Plaintiff's
19 worker's compensation claim on January 27, 2014. Tr. 448-454. Dr. Montgomery
20 diagnosed mood disorder with moderate depressive symptoms related to a general
21 medical condition, which is the lumber strain, and psychological factors, which are
22 her current stress levels, financial, and lack of personal support as well as a
23 hardworking history and pain disorder associated with a general medical condition.
24 Tr. 453-454. He indicated the diagnosis was mildly in excess of what would be
25 expected from her type of injury. Tr. 454. Dr. Montgomery opined there was no
26 psychiatric treatment that would be curative, but that a work hardening program
27 and/or return-to-work plan would certainly support Plaintiff's attempt to return to

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1 employment. Tr. 454. He specifically concluded Plaintiff was “capable of
2 working from a psychiatric point of view.” Tr. 454.

3 The ALJ assigned “great weight” to this assessment. Tr. 30. The ALJ
4 indicated that although the worker’s compensation report was not performed for
5 the purposes of Social Security disability, the relatively normal examination and
6 the conclusion that Plaintiff’s psychological condition did not prevent work was
7 consistent with the evidence of record. Tr. 30.

8 Plaintiff asserts that the ALJ failed to account for the fact that Dr.
9 Montgomery’s report was based on an “L&I consultative exam” and appears to
10 argue that standards for L&I benefits differ from Social Security disability
11 standards. ECF No. 15 at 14-15. Contrary to Plaintiff’s assertion, the ALJ
12 specifically noted Dr. Montgomery’s exam was a psychiatric evaluation pertaining
13 to Plaintiff’s worker’s compensation claim and not performed for the purposes of
14 Social Security disability. Tr. 30. The relatively normal psychiatric exam of Dr.
15 Montgomery, including findings that Plaintiff’s speech was well organized and no
16 disorganization of thought processes existed, her recent and distant memory were
17 normal and her judgment was within limits, was pertinent to the ALJ’s evaluation
18 of the evidence. It was proper for the ALJ to consider the examination and accord
19 weight to Dr. Montgomery’s opinion, based on his psychiatric examination
20 findings, that Plaintiff was “capable of working from a psychiatric point of view.”
21 Tr. 454.

22 **d. Non-Examining Medical Professionals**

23 State agency reviewer Michael L. Brown, Ph.D., evaluated Plaintiff on
24 January 27, 2014. Tr. 85-89. Dr. Brown concluded Plaintiff had mild restrictions
25 of activities of daily living, moderate difficulties in maintaining social functioning,
26 and moderate difficulties in maintaining concentration, persistence or pace. Tr. 85.
27 He further found that Plaintiff could maintain simple, repetitive, routine tasks
28 consistently, could work with supervisors and coworkers but not the general public

1 due to symptoms of anxiety and depression, and required work that did not change
2 frequently. Tr. 88-89. On April 25, 2014, Renee Eishauer, Ph.D., performed the
3 reconsideration psychological assessment and affirmed Dr. Brown's opinions. Tr.
4 103-105.

5 The ALJ accorded "significant weight" to the state agency assessments
6 finding they were based on a review of the record, evidence supported their
7 findings, and the assessors were familiar with the Social Security Administration
8 regulations. Tr. 31.

9 The opinions of the above non-examining medical professionals lends
10 further support to the ALJ's RFC determination that Plaintiff was capable of
11 performing unskilled, routine and repetitive tasks with only occasional, incidental
12 contact with the general public. The Court finds that, other than the significant
13 limitations indicated in Dr. Schneider's check-box report, there has been no
14 medical evidence provided that conflicts with the opinions of the state agency
15 reviewers.

16 The ALJ did not err by failing to find greater mental restrictions than as set
17 forth in the RFC determination. The psychological limitations assessed by the ALJ
18 are supported by the weight of the record evidence and free of error.

19 **2. Physical Limitations**

20 With regard to Plaintiff's physical impairments, the ALJ determined
21 Plaintiff had a severe spine disorder and morbid obesity, Tr. 22, which limited her
22 to light exertion level work with certain postural and environmental restrictions.
23 Tr. 25.

24 **a. Shereen Stocker, ARNP**

25 Nurse Stocker, an "other source," filled out a "Medical Report" statement
26 form provided by Plaintiff's attorney on March 23, 2015. Tr. 531-532. Nurse
27 Stocker indicated Plaintiff must lie down for 15 to 30 minutes during the day to
28 decrease low back pain and that Plaintiff could not sit, stand or walk for extended

1 periods. Tr. 531-532. Although Nurse Stocker stated that work on a regular and
2 continuous basis would cause Plaintiff's condition to deteriorate, she opined that
3 Plaintiff would not miss work due to her impairments if she attempted to work a
4 40-hour workweek. Tr. 532.

5 The ALJ accorded partial weight to Nurse Stocker's opinions. Tr. 31. The
6 ALJ indicated Nurse Stocker's opinion that Plaintiff needed to lie down when in
7 pain was primarily a subjective observation and no specific objective rationale was
8 cited for the requirement. Tr. 31. The ALJ noted there was other evidence also
9 indicating Nurse Stocker primarily relied on Plaintiff's subjective complaints;
10 Nurse Stocker filling out disability paperwork to just "get the processes started."
11 Tr. 31. The ALJ further held that the report was internally inconsistent because
12 Nurse Stocker listed significant limitations due to pain, yet stated Plaintiff would
13 not miss work due to her impairments. Tr. 31.

14 As determined by the ALJ, Nurse Stocker provided no objective basis for
15 her opinion that Plaintiff needed to lie down for 15 to 30 minutes when pain
16 occurred, therefore the limitation is based on Plaintiff's subjective complaint.¹
17 Furthermore, Nurse Stocker's report is internally inconsistent; she indicates
18 Plaintiff had significant limitations, but also found that Plaintiff would not miss
19 work if attempting to work a 40-hour workweek. Tr. 531-532. The ALJ provided
20 germane reasons for discounting Nurse Stocker's "Medical Report."

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24 ¹As discussed below, the ALJ's reasons for discounting plaintiff's subjective
25 complaints in this case are supported by the evidence of record and free of error.
26 *See Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001) (a physician's
27 opinion may be disregarded when it is premised on the properly rejected subjective
28 complaints of Plaintiff).

1 **b. Lisa Rutherford, ARNP**

2 On March 21, 2012, a few days after Plaintiff's on-the-job injury, Nurse
3 Rutherford examined Plaintiff and released her to modified work duties with
4 restrictions of reduced hours and no driving of motor vehicles while using the
5 prescribed opioid pain medications. Tr. 438-439. On January 25, 2013, Nurse
6 Rutherford again examined Plaintiff and released her to modified work duties
7 which had been lessened to some degree. Tr. 389-390. On March 13, 2013, Nurse
8 Rutherford again released Plaintiff to modified work duties. Tr. 388. On July 16,
9 2013, Nurse Rutherford released Plaintiff to full work activity without restriction.
10 Tr. 360.

11 The ALJ assigned "great weight" to the findings of Nurse Rutherford
12 because she treated Plaintiff, she reviewed a prior assessment with objective
13 findings, and the record supported her opinions. Tr. 29.

14 Plaintiff asserts that, based on Nurse Rutherford's findings that Plaintiff was
15 limited to reduced work hours, Plaintiff was not capable of working on a regular
16 and continuing basis eight hours per day, five days per week and, accordingly, was
17 disabled under the Social Security Act. ECF No. 15 at 12-13 citing Social Security
18 Ruling 96-8p. However, Nurse Rutherford released Plaintiff to modified work
19 duty at her place of employment as a result of a specific finding that "there was no
20 light duty available with the employer of injury." Tr. 388. This suggests Plaintiff
21 was capable of performing light duty work, at the employer of injury, if available,
22 on a regular and continuing basis. In any event, an ability to work eight hours a
23 day, five days a week is not necessarily required.²

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25 ²Part-time work may constitute substantial gainful activity under the Social
26 Security Act, or demonstrate the ability to engage in substantial gainful activity.
27 20 C.F.R. §§ 404.1572(a), 416.972(a) (work may be considered substantial even if
28 it is done on a part-time basis); *Katz v. Secretary of Health & Human Services*, 972

1 The ALJ properly accorded weight to Nurse Rutherford's opinion that
2 Plaintiff could perform work and did not err by failing to conclude Nurse
3 Rutherford's opinions supported a finding that Plaintiff was disabled.

4 **c. St. Elmo Newton, III, M.D. & James M. Haynes, M.D.**

5 Drs. Newton and Haynes completed a joint evaluation on June 25, 2013. Tr.
6 303-313. It was noted that following Plaintiff's March 12, 2012 on-the-job injury,
7 Plaintiff had x-rays that showed only mild degenerative changes in the lumbar
8 spine and, on April 16, 2012, a lumbar MRI was read as normal. Tr. 303, 306. A
9 repeat MRI performed four months later showed facet changes at L4-L5, a slight
10 bulge at L5 midline and degenerative changes in the sacroiliac joints. Tr. 304. She
11 was treated with chiropractic care, massage therapy, physical therapy and anti-
12 inflammatory medications and later received two injections in her right sacroiliac
13 joint. Tr. 304.

14 The ALJ assigned "great weight" to the assessment of these physicians. Tr.
15 29. The ALJ indicated that while the report was produced for worker's
16 compensation purposes, and thus was not necessarily consistent with Social
17 Security disability standards, it was overall consistent with the evidence of record.
18 Tr. 29.

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21 F.2d 290, 294 (9th Cir. 1992) (the fact that the claimant worked only part-time is
22 not enough alone to conclude that she was not engaged in substantial gainful
23 activity); *Garnett v. Sullivan*, 905 F.2d 778 (4th Cir. 1990) (work as a bus driver
24 involving minimal time per day typical of bus driving positions and substantial
25 gainful activity); *Wright v. Sullivan*, 900 F.2d 675 (3rd Cir. 1990) (work as rape
26 counselor in very flexible circumstances considered substantial gainful activity);
27 *Beasley v. Califano*, 608 F.2d 1162 (8th Cir. 1979) (despite limits and difficulty,
28 part-time work as a real estate broker considered substantial gainful activity).

1 Plaintiff argues that the ALJ should have found that the conclusion of Drs.
2 Newton and Haynes that there was “nothing really physiologic[ally]” wrong with
3 Plaintiff, did not match their examination findings. ECF No. 15 at 14. The Court
4 does not agree.

5 Drs. Newton and Haynes thoroughly examined Plaintiff and noted Plaintiff
6 could climb up on the examination table, the strength in her lower extremities was
7 5/5, a sensory examination was within normal limits, supine straight leg raise on
8 the left was 60 degree, she could stand on either leg independently, there was great
9 trochanter tenderness without neurological deficit and some degree of Waddell
10 positively. Drs. Newton and Haynes indicated Plaintiff vocalized discomfort, but
11 there was nothing really physiologic found. Tr. 309. They opined Plaintiff was
12 fixed and stable and there were no physical restrictions preventing Plaintiff’s return
13 to employment. Tr. 311. Drs. Newton and Haynes determined Plaintiff could lift
14 and carry up to 20 pounds occasionally and up to ten pounds continuously, she
15 could occasionally perform postural activities except for frequent reaching, and
16 there were no environmental restrictions. Tr. 314.

17 Contrary to Plaintiff’s argument, the findings of Drs. Newton and Hayes are
18 consistent with their examination results and the weight of the record evidence.
19 The ALJ did not err by according great weight to this assessment.

20 **d. Non-Examining Physician**

21 State agency reviewing physician Wayne Hurley, M.D., evaluated Plaintiff
22 on April 25, 2014. Tr. 101-103. Dr. Hurley determined Plaintiff could perform
23 light exertion level work with some postural and environmental limitations. *Id.*

24 The ALJ accorded “significant weight” to the Dr. Hurley’s assessment,
25 finding his opinions were based on a review of the record, evidence supported his
26 findings, and he was familiar with the Social Security Administration regulations.
27 Tr. 31.

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1 Plaintiff only contends that the ALJ failed to provide sufficient reasons for
2 giving weight to the non-examining physician. ECF No. 15 at 15. When a
3 nontreating source's opinion contradicts that of a treating physician, but it is not
4 based on independent clinical findings, the opinion of the treating physician may
5 be rejected only if the ALJ gives specific, legitimate reasons for doing so that are
6 based on substantial evidence in the record. *Andrews v. Shalala*, 53 F.3d 1035,
7 1041 (9th Cir. 1995); *Ramirez v. Shalala*, 8 F.3d 1449, 1453 (9th Cir.1993)
8 (applying test where ALJ relied on contradictory opinion of nonexamining medical
9 advisor). Here, there is no acceptable treating physician opinion that contradicts
10 the assessment of Dr. Hurley. Moreover, there is no requirement that the ALJ
11 provide "sufficient reasons" for according weight to a medical professional, rather
12 the Court reviews whether the ALJ has failed to provide legally sufficient reasons
13 for **rejecting** evidence. *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th Cir. 2014).
14 Accordingly, Plaintiff's argument with respect to Dr. Hurley is without merit.

15 Based on the foregoing, the Court finds that the ALJ did not err by failing to
16 find greater physical limitations than as assessed in the RFC determination. The
17 physical limitations assessed by the ALJ are supported by the weight of the record
18 evidence and free of error.

19 **B. Plaintiff's Symptom Testimony**

20 Plaintiff also challenges the ALJ's finding that Plaintiff was not entirely
21 credible, Tr. 25. ECF No. 15 at 16-20.

22 It is the province of the ALJ to make credibility determinations. *Andrews*,
23 53 F.3d at 1039. However, the ALJ's findings must be supported by specific
24 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent
25 affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's
26 testimony must be "specific, clear and convincing." *Smolen*, 80 F.3d at 1281;
27 *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995). "General findings are
28 insufficient: rather the ALJ must identify what testimony is not credible and what

evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

In this case, the ALJ found Plaintiff's medically determinable impairments could reasonably be expected to cause some of the alleged symptoms; however, Plaintiff's statements concerning the intensity, persistence and limiting effects of those symptoms were not entirely credible. Tr. 25.

The ALJ first indicated Plaintiff's subjective complaints were not reasonably consistent with the medical evidence of record. Tr. 26. The ALJ noted that although examinations revealed some positive findings in the spine, overall, they had been fairly unremarkable and did not show that Plaintiff's symptoms were disabling. Tr. 26.

A lack of supporting objective medical evidence is a factor which may be considered in evaluating an individual's credibility, provided it is not the sole factor. *Bunnell v. Sullivan*, 347 F.2d 341, 345 (9th Cir. 1991) (Once a claimant produces objective medical evidence of an underlying impairment, an adjudicator may not reject the claimant's subjective complaints based solely on a lack of objective medical evidence to fully corroborate the alleged severity of pain.); *see also Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 883 (9th Cir. 2006) (An ALJ may not make a negative credibility finding "solely because" the claimant's symptom testimony "is not substantiated affirmatively by objective medical evidence.").

As indicated in Section A, above, the medical evidence of record does not support Plaintiff's allegation of disabling physical and/or mental limitations.

The ALJ next noted Plaintiff has reported the effectiveness of medication in improving her mental health symptoms. Tr. 26.

The effectiveness of medication in alleviating pain and other symptoms is a relevant factor to consider in evaluating the severity of a claimant's symptoms. 20 C.F.R. § 416.929(c)(3)(iv); *Morgan v. Comm'r of Social Sec. Admin.*, 169 F.3d 595, 600 (9th Cir. 1999) (an ALJ may properly rely on a report that a plaintiff's

1 mental symptoms improved with the use of medication); *Odle v. Heckler*, 707 F.2d
2 439, 440 (9th Cir. 1983) (noting impairments that are controlled by treatment
3 cannot be considered disabling).

4 The record reflects Plaintiff's mood had improved with medication, Tr. 381,
5 385, 389, she was not receiving any specific psychiatric treatment by January
6 2014, Tr. 452, and she had previously discontinued mental health counseling, Tr.
7 67. Tr. 26-27. It was reported in June 2014 that Plaintiff's affect was brighter, she
8 was less anxious and her thought process was more focused, and Plaintiff admitted
9 her depression was slightly better. Tr. 27, 558-559. As indicated by the ALJ,
10 mental status examinations performed in 2015 showed Plaintiff was alert/oriented
11 and in no acute distress. Tr. 27, 481, 486, 489, 492.

12 The evidenced improvement of Plaintiff's mental health symptoms was an
13 additional proper basis to discount her subjective complaints.

14 The ALJ also indicated Plaintiff was not working only because no light duty
15 work was available at her job. Tr. 27, 388. The inability to work due to
16 nondisability factors is a valid basis for rejecting a claimant's credibility. *Bruton v.*
17 *Massanari*, 268 F.3d 824, 828 (9th Cir. 2001) (stating that in making a credibility
18 determination, the ALJ did not err by considering that claimant left his job because
19 he was laid off, rather than because he was injured).

20 The ALJ properly discounted Plaintiff's credibility on the basis that she was
21 not working for reasons unrelated to her alleged disabling limitations.

22 The ALJ also mentioned Plaintiff continued to apply for work online as a
23 cashier during the relevant time period, but she was not interviewed. Tr. 27.
24 Seeking employment after the alleged onset of disability date may be a factor in an
25 ALJ's credibility determination. *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d
26 1219 (9th Cir. 2009). This was additionally a proper basis to find Plaintiff less
27 than fully credible.

28 ///

1 The ALJ next noted Plaintiff received unemployment benefits after her
2 worker's compensation claim was closed. Tr. 27. A disability claimant's
3 acceptance of unemployment benefits can constitute a valid reason in support of an
4 ALJ's adverse credibility determination. *Copeland v. Bowen*, 861 F.2d 536, 542
5 (9th Cir. 1988) (upholding ALJ's rejection of a claimant's credibility where the
6 claimant had accepted unemployment insurance benefits "apparently considering
7 himself capable of work and holding himself out as available for work"); *see also*
8 *Ghanim v. Colvin*, 763 F.3d 1154, 1165 (9th Cir. 2014) ("continued receipt" of
9 unemployment benefits can cast doubt on a claim of disability); *Hasso v. Colvin*,
10 617 Fed. Appx. 780, 781 (9th Cir. 2015) (unpublished) (upholding adverse
11 credibility determination based in part on the claimant's "receipt of unemployment
12 benefits").

13 Here, Plaintiff filed for and received unemployment benefits after she
14 stopped working at her job and, consequently, acknowledged she was "ready,
15 willing, and able to work" at the time she filed for those benefits. See Wash. Rev.
16 Code § 50.20.010(c)(ii) (indicating "an individual must be ready, able, and willing,
17 immediately to accept any suitable work which may be offered to him or her and
18 must be actively seeking work"). Accordingly, Plaintiff's acceptance of
19 unemployment benefits while simultaneously seeking Social Security benefits was
20 a proper basis to discount Plaintiff's credibility.

21 Finally, the ALJ indicated Plaintiff's reported full range of daily activities
22 were inconsistent with her assertions of totally disabling symptoms. Tr. 27. It is
23 well-established that the nature of daily activities may be considered when
24 evaluating credibility. *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). While
25 one does not need to be "utterly incapacitated" to be disabled, *id.*, it was proper for
26 the ALJ to find Plaintiff's reports of activities such as doing household chores
27 (laundry, dishes, sweeping, vacuuming, mowing and preparing meals); caring for
28 her children, an elderly friend, and pets; and shopping were inconsistent with the

1 debilitating limitations she alleged³ and thus detracted from her overall credibility.
2 Tr. 27. *See Smith v. Comm’r Soc. Sec. Admin.*, 611 Fed.Appx. 897, 900 (9th Cir.
3 2015) (affirming the ALJ’s adverse credibility determination and noting the ALJ
4 found the claimant’s testimony was contradicted by “her own description of
5 helping with” the “care of children” and household chores); *Rollins v. Massanari*,
6 261 F.3d 853, 857 (9th Cir. 2001) (affirming the ALJ’s adverse credibility
7 determination and noting that the claimant’s claim of disability was undermined by
8 testimony about her daily activities, such as “attending to the needs of her two
9 young children,” cooking, and shopping); *see also Molina v. Astrue*, 674 F.3d
10 1104, 1113 (9th Cir. 2012) (“Even where [a claimant’s daily] activities suggest
11 some difficulty functioning, they may be grounds for discrediting the claimant’s
12 testimony to the extent that they contradict claims of a totally debilitating
13 impairment.”).

14 The ALJ is responsible for reviewing the evidence and resolving conflicts or
15 ambiguities in testimony. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.
16 1989). It is the role of the trier of fact, not this Court, to resolve conflicts in
17 evidence. *Richardson v. Perales*, 402 U.S. 389, 400 (1971). The Court has a
18 limited role in determining whether the ALJ’s decision is supported by substantial
19 evidence and may not substitute its own judgment for that of the ALJ even if it
20 might justifiably have reached a different result upon *de novo* review. 42 U.S.C. §
21 405(g). After reviewing the record, the Court finds that the ALJ provided clear
22 and convincing reasons, which are fully supported by the record, for discounting
23

24 ³Plaintiff indicated she had low back pain that was exacerbated by prolonged
25 sitting and standing, Tr. 412, she was unable to sit for more than 30 minutes at a
26 time, Tr. 443, she had “extreme difficulty standing, sitting and walking,” Tr. 212,
27 she was only able to stand 20 to 30 minutes at one time, Tr. 212, and she needed to
28 lie down frequently due to pain, Tr. 212. Tr. 25.

1 Plaintiff's subjective complaints. Accordingly, the ALJ did not err by finding
2 Plaintiff's symptom allegations were not entirely credible in this case.

3 **CONCLUSION**

4 Having reviewed the record and the ALJ's findings, the Court finds the
5 ALJ's decision is supported by substantial evidence and free of legal error.

6 Accordingly, **IT IS ORDERED:**

7 1. Defendant's Motion for Summary Judgment, **ECF No. 16**, is
8 **GRANTED.**

9 2. Plaintiff's Motion for Summary Judgment, **ECF No. 15**, is **DENIED.**

10 The District Court Executive is directed to file this Order and provide a copy
11 to counsel for Plaintiff and Defendant. Judgment shall be entered for Defendant
12 and the file shall be **CLOSED.**

13 DATED May 30, 2018.



A handwritten signature in black ink, appearing to be "M", is written over a horizontal line.

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JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE